No. 12856

United States
COURT OF APPEALS
for the Ninth Circuit

OREGON CHROME MINES, INC.,
Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPELLANT'S BRIEF

Petition to Review a Decision of the Tax Court of the United States.

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JURISDICTIONAL STATEMENT

This is an appeal from a decision of the Tax Court of the United States ordering and deciding that there was a deficiency in appellant's excess profits tax of $15,085.16 for the calendar year 1944.

This case was tried in the Tax Court on the amended petition (R. 5) and answer to the amended petition (R. 16). The issues in the Tax Court were narrowed to the

sole question whether appellant was "engaged in the mining" of chromite within the meaning of Section 731 of the Internal Revenue Code. The opinion of the Tax Court was divided on this question.

The Tax Court of the United States had jurisdiction of this cause under the provisions of Title 26, U.S.C., Sec. 1101.

This Court has jurisdiction to review by appeal the judgment of the Tax Court of the United States under the provisions of Title 26, U.S.C., Sec. 1141.

This case is not one in which direct review may be had in the Supreme Court of the United States under the provisions of Title 28, U.S.C., Secs. 1252-1257.

STATEMENT OF THE CASE

The appellant Oregon Chrome Mines, Inc., appeals from the decision of the Tax Court of the United States which sustained the determination of the respondent Commissioner of Internal Revenue that during the taxable year 1944 petitioner was not entitled to the excess profits tax exemption granted by Sec. 731 of the Internal Revenue Code to any domestic corporation engaged in the mining of chromite, a strategic mineral, within the United States. The only question in this case is whether petitioner was engaged in the "mining" of chromite within the meaning of Sec. 731. Petitioner maintains that it was so engaged and appeals from the too narrow interpretation of Sec. 731 made by the Tax Court.

SPECIFICATION OF ERROR

The Tax Court erred in denying the appellant exemption from excess profits tax under Sec. 731, Internal Revenue Code, where the findings disclose appellant was a domestic corporation engaged in mining chromite and that its income was attributable to such mining in the United States.

POINTS AND AUTHORITIES

(1) Appellant, engaged in mining on a share-the-ore basis or tribute lease system, is engaged in mining within the meaning of section 731, Internal Revenue Code.

Section 731, Internal Revenue Code.

Section 304 (c) of the Revenue Act of 1921.

Committee on Appeals and Reviews, A.R.R. 6011, III-1 C.B. 377.

(2) The word "engaged" means "to set about, to take up", or "to attract and hold fast (the attention, interest, etc.); occupy the attention or efforts of (a person)".

Roget's Thesaurus of the English Language in Dictionary Form.

The New Century Dictionary, vol. 1, R. P. Collier and Son Corp.

(3) The meaning of the word "mining" is not limited to the extraction of ore from the earth.

Webster's New International Dictionary, Second Edition.

Corpus Juris Secundum, vol. 58, p. 35.

(4) Appellant realizing income attributable to having engaged in mining previously is entitled to the exemption of section 731, Internal Revenue Code.

Section 731, Internal Revenue Code.

(5) In order to apply a statute in accordance with the way Congress intended it, it is appropriate to consider the context, the purpose, and the circumstances of the statute's enactment.

Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 55 S. Ct. 50, 79 L. Ed. 211 (1934).

Foster, et al. v. United States, 303 U.S. 118, 58 S. Ct. 424, 82 L. Ed. 700 (1938).

(6) Congress did not intend to limit the exemption of section 731 of the Internal Revenue Code to the extraction of chromite from mines existing and operating, but intended to encourage the development of new sources of supply.

H. Rep. No. 3002, 76th Cong., 3rd sess., 1940-2 C.B. 548, 559.

Cong. Record, vol. 86, pp. 12347, 12348, 12920.

H. Rep. No. 1040, 77th Cong., 1st sess., 1941-2 C.B., 413, 434.

Cong. Record, vol. 87, pp. 6710-11, 6725-26, 7440-41.

S. Rep. No. 1631, 77th Cong., 2nd sess., 1942-2 C.B. 504, 536-538.

ARGUMENT

Whether to follow the majority view or the minority view expressed in the Court below is the problem here

on review. This case was tried on the merits by Judge Arundell who was joined in his dissent by Judges Van Fossan, Johnson and Tietjens, all of whom agreed that unless a much broader interpretation were given to Sec. 731 than that pronounced in the majority opinion, the very purpose of its enactment would be defeated (R. 32, 34).

In order to be entitled to the exemption from excess profits taxes within Sec. 731, I.R.C., appellant must possess three qualifications: (1) it must be a domestic corporation, (2) it must be engaged in mining a strategic mineral (here chromite), and (3) its income must be attributable to such mining in the United States. The first and third factors are admitted, and it is conceded that if appellant was engaged in mining, it is entitled to the benefit of the exemption provided by Sec. 731, Internal Revenue Code, which see (App. A).

The majority opinion below was based upon its conclusion that during the year 1944, the appellant was not actively engaged in mining, interpreted narrowly as the physical extraction of ore from the earth. The majority opinion framed the issue thus: "The narrow question for our determination in this proceeding is whether petitioner was 'engaged in mining' of chromite within the meaning of Sec. 731 during the taxable year 1944 . . ." (R. 26, 27). Thus stated, the question reads into the statute an additional requirement not placed there by Congress, i.e., that the taxpayer be engaged in mining during the year the income is realized. When coupled with a narrow interpretation of the term "mining" to

mean extraction of ore, this time requirement creates a new restriction upon the exemption which Congress did not see fit to enact.

The appellant respectfully submits that its entire existence has been for the purpose of mining; it has no other business and the articles of incorporation under which the corporation was formed call for it to engage in mining (R. 21, 22). Now the court below took a scornful view of the mining activities in which the appellant managed to engage in the calendar year 1944, but the fact remains that the appellant's income for that year was realized as a result of its active engagement in mining in a prior year (R. 30). The source of the income is the important criterion set up in Sec. 731 to determine eligibility for the exemption. It is appellant's position that the taxable income of a given year is frequently realized only after a period of delay following the economic effort which produced the income.

It is apparent that appellant was actively engaged in mining, at least in 1942, if we consider the findings of the Court below. The appellant completed several hundred feet of tunnel work and engaged in raising, drifting and cross-cutting for the purpose of finding chromite ore (R. 23). The fact that appellant explored and developed the Agnes group of mining claims from June 24, 1941, until April 12, 1942, is significant and material in determining that appellant was engaged in mining although the Court below considered otherwise (R. 30). The appellant did not cease to engage in mining when in April of 1942 it leased its mining claims to William S. Robertson.

In the lease appellant agreed that it would keep its title to these unpatented mining claims valid by performing the required assessment work and by filing the necessary proofs of such work (R. 23). By this working arrangement Mr. Robertson agreed to pay to the appellant 20% of all amounts received from the sale of ore and from the 80% retained by him Mr. Robertson agreed to pay the expenses of operation. This arrangement was in effect during 1944, the period under consideration, modified only as to the percentage that appellant and Mr. Robertson were to receive. The terms of the lease stated in pertinent part are in App. B.

The acquisition of the unpatented group of mining claims, and the performance of work to make these claims into a mine, were all necessary to enable the appellant to negotiate a lease whereby Robertson would mine the claims on a share-the-ore basis. In a sense appellant was actively engaged in extracting ore through Robertson.

Although no cases interpreting Sec. 731 have been encountered by the appellant, a somewhat similar law was enacted in order to encourage the domestic mining of gold at the time of World War I and a case arising under that earlier enactment is in harmony with petitioner's position at present.

Sec. 304 (c) of the Revenue Act of 1921 provided:

> "(c) In the case of any corporation engaged in the mining of gold, the portion of the net income derived from the mining of gold shall be exempt from the tax imposed by this title or any tax imposed by Title II of the Revenue Act of 1917 and

> the tax on the remaining portion of the net income shall be the same proportion of a tax computed without the benefit of this subdivision which such remaining portion of the net income bears to the entire net income."

The Committee on Appeals and Reviews was asked by the Income Tax Unit to pass on the question whether or not taxpayers income received under a tribute lease system of mining gold was income derived from the mining of gold within the meaning of the foregoing statute. A.R.R. 6011, III-1, C.B. 377. The Committee found the tribute leases to be little more than profit sharing arrangements whereby the lessee miners performed the manual labor of getting out the ore, furnished some portion of the supplies consumed therein, and received in return therefor an agreed percentage of the gold in the ores extracted. After considering the evidence, it was the opinion of the Committee that the income received by the taxpayer should be considered as income derived from the mining of gold and entitled to the exemption from taxes imposed by Title II of the Revenue Act of 1917, as provided in Sec. 304(c) of the Revenue Act of 1921.

The earlier statute enacted to induce more gold mining within the United States is indicative of the purpose of the similar measure enacted during World War II to encourage increased domestic production of strategic minerals including chromite, and appellant urges that a similar interpretation should be given to its own income derived from the mining of chromite under the share lease arrangement that it had with Robertson.

If appellant was not engaged in mining, then in what industry was it engaged? If a farmer were to plant, cultivate and grow a crop of wheat, it would be just as logical to say that he was not engaged in farming when his crop was harvested on shares as it would be to say that when appellant drove tunnel, drifted, raised, crosscut and developed ore in the ground and then realized his income from his efforts by a share agreement that he was not engaged in mining.

The meaning of the word "mining" is not limited to the extraction of ore from the earth but includes the act or business of making mines or working them. The definitions cited by the majority so interpret the meaning of the word. Webster's New International Dictionary, Second Edition, states that: "Mining is the act or business of making, or of working mines." Corpus Juris Secundum, Volume 58, Page 35, Section 3, declares that: "Mining, as generally defined, is . . . the act or business of making mines or working them." (R. 29).

If the attentions or efforts of appellant were occupied by mining to any degree, then it was engaged in mining, although it may not be engaged in physically extracting ore from the earth. The word "engaged" means "to set about, to take up." Roget's Thesaurus of the English Language in Dictionary Form. "Engaged" means "to attract and hold fast (the attention, interest, etc.); occupy the attention or efforts of (a person, etc.)." The New Century Dictionary, Volume I, published by R. P. Collier & Son Corporation.

Abstract definitions of the words in a statute, al-

though helpful, are not a dependable measuring stick with which to determine the limits of a tax exemption. In order to apply the statute to a practical problem in the way Congress intended it, it is appropriate to consider the context, the purpose, and the circumstances of the statute's enactment. *Helvering v. Stockholms Enskilda Bank,* 293 U.S. 84, 55 S. Ct. 50, 79 L. Ed. 211 (1934); *Foster, et al. v. United States,* 303 U.S. 118, 58 S. Ct. 424, 82 L. Ed. 700 (1938).

From the legislative history, it is apparent that it was not the intention of Congress to limit the exemption to corporations engaged in the actual extraction of ore. The purpose of this section was to encourage prospectors to go out into the field and make discoveries of deposits of chromite and other strategic metals. Congress did not intend to limit the exemption to the extraction of chromite from mines existing and operating, but obviously intended to encourage the development of new sources of supply. This observation is forcefully pointed out in Judge Arundell's dissenting opinion as follows:

> "To deny petitioner the benefits of Section 731 because it did not engage in the actual extraction of ore from the claims is to say that Congress intended only to accelerate the production of chromite from mines already existing and operating within the United States or to benefit only those firms possessed of sufficient financial resources to undertake and complete the exploitation of mining properties without outside assistance. In my opinion, this result is in direct conflict with the intent evidenced by Congress in its Committee Reports* . . ."

*See H. Rep. No. 3002, 76th Cong., 3d sess., 1940-2 C.B. 548, 559; Cong. Record, Vol. 86, pp.

12347, 12348, 12920; H. Rep. No. 1040, 77th Cong., 1st Sess., 1941-2 C.B. 413, 434; Cong. Record, Vol. 87, pp. 6710-11, 6725-26, 7440-41; S. Rep. No. 1631, 77th Cong., 2d sess., 1942-2 C.B. 504, 536-538.

House Rep. No. 3002, 76 Congress, 3rd Session, 1940-2 C.B. 548, 559—"Sec. 731 INCOME FROM MINING STRATEGIC METALS (Sec. 730 of Senate Amendment): This section is new in the Senate Amendment, no comparable provision having been contained in the House Bill. It exempts from excess profits tax income derived from mining, reduction, or beneficiation of . . . chromite . . . , or the ores and material containing such metal. These materials have been declared to be strategic materials by the War Department. The exemption provided in Sec. 730 is intended to encourage their domestic production. . . ."

Cong. Record, Vol. 86, 76 Congress, 3rd Session, pp. 12347, 12348—Mr. Pittman " . . . The position I present is merely this: These are essential war materials. It is so stated by the War Department. Our importations may be cut off. It is necessary to increase production in this country. With these new industries expanding rapidly, or attempting to expand rapidly, generally with a great loss of money for several years, it is impracticable to attempt to assess excess profits tax against them. I ask for a vote on the amendment."

Cong. Record, Vol. 86, 76 Congress, 3rd Session, p. 12920.—Mr. Harrison " . . . I stated that there were six or seven metals or represented dealt with in the Senator's amendment (Pittman). We were not able to get the House Conferees to agree to the exact language of the Senate Amendment, but we were able to point out that the President in a message to the Congress, as I recall—I do not know that he included all of these metals—had asked us to enact legislation to preserve these strategic metals in the United States for our own defense."

House Rep. No. 1040, 77 Congress, First Session, 1941-2 C.B. 413, 434—"6 INCOME FROM MINING STRATEGIC METALS. The existing law exempts from excess-profits tax that portion of the adjusted excess-profits tax net income of a domestic corporation which is attributable to mining within the United States of . . . chromite. . . .

"Your Committee has removed this exemption, as it is believed that these corporations which make money out of the defense program should bear their share of the tax burden."

Cong. Record, Vol. 87 77 Congress, First Session, pp. 6710, 6711—Mr. Angell "American Production of strategic minerals—Mr. Chairman, I understand this bill eliminates the excess-profits tax exemption formerly accorded to producers of . . . chromite . . . in the United States. These are strategic minerals which are necessary for the prosecution of our national defense. The supply is very limited and we have heretofore, by legislation, encouraged the producers of these strategic minerals to increase our production in the United States. By the elimination of this provision of our tax law, it will remove one of the most important incentives that our miners have for producing these strategic minerals in this national emergency. The production of these minerals in the United States is much more expensive than that in foreign countries where coolie and other cheap labor can be obtained and our local producers cannot successfully meet such competition. We should build up our own supplies of these essential raw materials so that in times of emergency, such as that facing us, we shall not be compelled to rely on foreign sources. . . .

"Mr. Chairman, I trust that this provision of the tax bill will be stricken so it will permit the producer of these strategic materials to continue under the provisions of the law as it presently exists."

Cong. Record, Vol. 87, 77 Congress, First Ses-

sion, pp. 6725-26—Mr. Scrugham " . . . It is fully recognized by all of the agencies of the Federal Government that the strategic metals named in the above quoted law are absolutely necessary to the defense of this country in the present emergency and that without them, our position becomes grave, indeed. The above section of the law was passed by the Congress and approved by the President for the express purpose of developing and bringing into production every possible domestic source of these metals.

"The Defense Agencies of our Government have urged the mining men of the United States to seek and produce the vitally needed metals in large quantities, and in responding to the requests of their Federal Government, literally hundreds of these men have made heavy commitments. . . .

"It must be emphasized and realized that these properties are uneconomic except at the present time, and that they cannot produce at the end of the emergency when cheap foreign metals will again fulfill the normal demand. . . ."

"The elimination of this exemption from the excess profits tax will actually result in loss of revenue to the Government instead of increased revenues, because the throttling of incentive to seek and develop the marginal ores will kill productive enterprise. In relying on the present law producers are venturing large amounts in prospecting and consequently are taking risks of large losses. There are two particularly strong reasons why the Committee on Ways and Means, Congress, and the executive branch of Federal Government should not eliminate this well-considered exemption:

"First. It is acting in bad faith with those who have gone ahead with the development of these metals under the appeal and encouragement previously given.

"Second. It will result in the utter discourage-

ment of any further development of ore bodies or recovery processes for these metals. . . .

" . . . The following outlines the more important facts which are particularly significant:

"1. Mining is a peculiarly hazardous industry—relying upon extraordinary profits for an occasional 'hit' to offset the losses of frequent 'misses'.

"2. Many mines are 'marginal' producers, and metal prices are widely fluctuating. For example, during the base period years, many mines were shut down or were operated at only partial capacity.

"3. Many mines were recently discovered—and many more, it is to be hoped, are awaiting discovery. In such cases, of course, their earning record (if any) is inadequate. . . .

"5. The defense program is dependent upon the success of the mining industry, which, in turn, is dependent upon continued exploration, discovery and development. . . ."

Cong. Record, Vol. 87, 77 Congress, First Session, pp. 7440-7441. Mr. McCarran:—" . . . It seems to me exceedingly unfortunate that the amendment which the senior Senator from Nevada offered, and which was adopted by the Committee on Finance and by the Senate, striking out the language of the House bill with regard to excess profits tax on strategic metals, should not have been retained in the bill. The elimination of the amendment from the bill sets up an unhappy situation in this country. Today we are striving to encourage the discovery and development of metals and minerals essential to national defense. With that in mind, the 1940 tax act carried provisions for exempting from excess profits tax mines and mining of seven strategic metals and minerals; namely, . . . chromite. . . .

" . . . We are today trying to encourage the discovery and development of these all-essential

metals in the United States because at the present time we are importing about $20,000,000 worth or more of these metals from India, from Russia, from Brazil, from Cuba and from other countries of the world. We have tried to find in this country sufficient of these all-essential metals to afford proper relief and proper security for our national defense. With that in mind, it has been said by way of argument that the money paid out for those metals is paid out by the government in any event, and therefore is a profit; but let me say to the Senate that there is no more hazardous industry in the world than the industry of mining. No one can look with any degree of certainty into great depths in the earth; vast sums of money may be necessary to develop a mine and perhaps after the development is completed the mine itself proves nonprofitable. Only about 1 mine out of every 20 involving discovery of strategic metals makes good. So the hazard of venturing private investment in mining, especially mining of strategic metals is ever-attendant and very great.

"The result of the action of the conferees, I am afraid, will be most unfortunate. In 1940, we provided encouragement to the miners of strategic metals; and they, believing we had established a permanent policy, went forward and made vast investments. They not only did that, but prospectors went out into the field and made discoveries and developments, and having made such discoveries and developments they thought there was a basic policy on which they could go forward. I am sorry to say that now, by this act, we have destroyed the encouragement we offered to the prospector and investor and today they do not know exactly where they stand. . . ."

Senate Report No. 1631, 77 Congress, Second Session, 1942-2 C.B. 504, 536 to 538. "MINING CORPORATIONS—In order to encourage produc-

tion of minerals in connection with the war effort, certain special allowances are granted to mines. These are as follows:

"1. Special net loss carry over. . . .

"2. Excess-profits relief for accelerated production of mines.—Many mining corporations, as a result of the expanding war production, may find themselves with properties substantially or fully exhausted within a relatively short period of time. Your Committee, therefore, believes that mining corporations with limited reserves should be given some relief from excess profits taxation on income arising from such accelerated output. . . .

"3. Exemption from excess profits tax of corporations engaged in mining of strategic metals.—Under the Revenue Act of 1940, income from the mining of strategic materials was exempt from the excess profits tax. These metals were . . . chromite. . . . These minerals have been declared to be strategic by the War Production Board. This exemption was removed by the Revenue Act of 1941. Your Committee was requested by representatives of the War Production Board to restore this exemption, as these minerals are vitally needed for the war effort. . . . This amendment has been made retroactive to cover taxable years beginning after December 31, 1940."

CONCLUSION

The prospecting, the discovery and the development of mining claims are essential and indispensable steps in mining. After the ore is found and the claims are made into a mine, the extraction and processes of treating ore are merely mechanical steps that follow the basic achievement. The great smelters and foundries which turn out the finished product do not come into existence

until the sources of minerals are discovered and proven. The miner with his burro, or his modern counterpart, the miner with his jeep, who struggles along on a shoestring and starts the development of a mineral deposit, is frequently the essential element in the creation of a big industry.

The greatest risk to capital is incurred in the initial stages of mining, the discovery and development work. After that risk is successfully taken, the much greater investment made to extract and treat the ore is comparatively safe. The appellant took the initial risk and did the essential development work on the Agnes group of mining claims, which brought the mine into actual existence for practical production during a time of critical need. Had it not been for appellant's efforts, it is likely that no such result would have occurred. As it happened, appellant's efforts resulted in the creation of a mine which was one of the largest producers of high grade chromite in the United States during an emergency when that mineral was vitally needed for the national defense.

Appellant thus performed the very activity that Congress specifically sought to encourage by enacting the tax exemption in Section 731.

Accordingly, appellant respectfully submits that it should be allowed the benefit of the tax exemption provided by that statute.

Respectfully submitted,

WM. B. MURRAY,
Attorney for Appellant.

APPENDIX A

SEC. 731, INTERNAL REVENUE CODE

"Corporations Engaged in Mining of Strategic Minerals.

"In the case of any domestic corporation engaged in the mining of . . . chromite . . . , the portion of the adjusted excess profits net income attributable to such mining in the United States shall be exempt from the tax imposed by this subchapter. The tax on the remaining portion of such adjusted excess profits net income shall be an amount which bears the same ratio to the tax computed without regard to this section as such remaining portion bears to the entire adjusted excess profits net income."

APPENDIX B

LEASE

"The lessor agrees:

"1. Oregon Chrome Mines, Inc., leases to William S. Robertson the above claims for a period of two years from date with an option of two additional years if the recovery from said claims is reasonably successful during the first two years.

"2. Oregon Chrome Mines, Inc., agrees that each year it will file with the proper authorities proof of labor for the past year so that title to said claims will remain in the corporation and locations to said claims be kept valid.

"3. Oregon Chrome Mines, Inc., will keep its corporate franchise intact, keep its corporate taxes paid, and will pay all governmental and state charges against said claims.

"The lessee agrees:

"1. To furnish such equipment, tools, and machinery, and labor as will be necessary to work said claims, and to explore said grounds to determine if the said land contains chrome ore, and if the said claims contain chrome ore he agrees to mine said claims and to ship said ore to market and to sell same to his best advantage.